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June 9, 2004

Director, Minerals Management Service,
Attention: Policy and Management Improvement
1849 C Street, NW., Mail Stop 4230
Washington, DC 20240-0001

Re: Advance notice of proposed rulemaking and announcement of public meetings concerning the Open and Non-Discriminating Movement of Oil and Gas as required by the Outer Continental Shelf Lands Act

To Whom It May Concern:

Attached for filing in response to the referenced notice, Duke Energy Field Services, LP (DEFS) offers one original and one copy of written comments.

Please return one date-stamped copy to my attention in the envelope provided.

If you have any questions regarding DEFS' comments, they may be directed to my attention.

Sincerely,

David E. Williams

DEW:cs
Enclosures

UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF THE INTERIOR

The Open and Non-Discriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act	§ § § §	Minerals Management Service 30 CFR Part 200

COMMENTS OF DUKE ENERGY FIELD SERVICES, LP, TO MMS OCSLA REGULATION

Duke Energy Field Services, LP ("DEFS") is pleased to submit the following comments to the Minerals Management Service ("MMS") in response to the Notice of Proposed Rulemaking issued by the MMS and published in the Federal Register on April 12, 2004 (the "Notice"). DEFS hopes that these comments will assist the MMS' efforts to determine the sufficiency of Department of the Interior ("DOI") regulations to ensure open and non-discriminatory access to pipelines operating in the Outer Continental Shelf ("OCS").

I. EXECUTIVE SUMMARY

The MMS has announced that it is considering new regulations that will ensure that pipelines transporting oil or gas under permits, licenses, easements, or rights-of-way on or across the OCS provide open and non-discriminatory access to both owner and non-owner shippers as required under sections 5(e) and 5(f) of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. 1334 (e) and (f). DEFS has a significant level of insight into Sections 5(e) and (f) of the OCSLA, and related provisions of that Act. By virtue of its participation in the Order No. 639[1]

[1] Regulations Under the OCSLA Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf, Order No. 639, 65 FR 20354 (Apr. 17, 2000), FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,097 (2000); Order on Reh'g, Order No. 639-A, 65 FR 47294 (Aug. 2, 2000), FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,103 (2000), Order Denying Clarification, 93 FERC ¶ 61,274 (2000); Order Denying Clarification, 93 FERC ¶ 61,274 (2000); Order on Request

OCSLA rulemaking proceedings before the Federal Energy Regulatory Commission ("FERC" or "Commission"), and through its extensive participation in the appeals of those regulations, DEFS brings a valuable perspective to this MMS proceeding.

As the MMS examines its various regulatory options, DEFS urges the MMS to be guided by the following principles:

1. **Any Regulation Should be Light-Handed and Guided by Competition.** Regulatory oversight on the OCS should be light-handed and guided by competitive forces. The OCS has developed into the vibrant production area that it is today without any agency-imposed OCSLA "enforcement" regimes. Rather, the requirements of non-discrimination and open-access imposed by sections 5(e) and 5(f) of the OCSLA have been self-policing and have demonstrated no need for additional enforcement efforts.

OCS pipelines have observed their OCSLA obligations, and there have been very few allegations of any violations of these requirements in the almost five decades since Congress mandated that rights-of-way and other federal authorizations to transport oil and gas on the OCS come attached with an open-access obligation. The OCS has undergone extensive development, and has become an extremely important source of supply for the United States. The MMS should make sure that new regulations, if any, will only further competitive forces on the OCS and enhance this success.

2. **Any Regulation Should Treat OCS pipelines in a Uniform Manner.** Under any new MMS regulations, all OCS pipelines should be subject to the same requirements. This includes gas lines, oil lines, common carriers, contract carriers, gathering lines and proprietary lines carrying the line owners' production. A major problem under the FERC's ill-conceived

for Confidential Treatment, 96 FERC ¶ 61,296 (2001); Order Clarifying Prior Order, 97 FERC ¶ 61,040 (2001); overturned and permanently enjoined, *Chevron U.S.A., Inc. v. FERC*, 193 F. Supp. 2d 54 (D.D.C. 2002); aff'd, *Williams Cos. v. FERC*, 345 F.3d 910 (D.C. Cir. 2003); Final Rule, Order No. 639-B, (Issued March 8, 2004).

OCSLA enforcement regulations was its application of stringent reporting regulations on some pipelines, while many other pipelines were exempt from any reporting obligation whatsoever. Regulatory requirements that single out one type of OCS player for enforcement, but that ignore other players, would create an unlevel OCS playing field, stifle competition, lessen OCS service offerings, and ultimately could drive certain parties out of the OCS transportation market.

3. **Any Regulations Should be Complaint-Driven.** The Notice indicates that MMS is actively considering the development of an official MMS complaint procedure. By focusing on facilitating the complaints process--rather than erecting a new regulatory reporting regime--the MMS is clearly on the right track. The OCSLA already provides a forum for complaints—the Federal Courts—and the most appropriate course of action would be for the MMS to allow the Courts to continue as the forum for complaint resolution.

If the MMS does create an additional forum for complaints, the MMS should avoid the imposition of regulatory definitions that formalize what shall constitute "discrimination" or "open-access" for purposes of the OCSLA. Whether "discrimination" or failure to grant "open-access" has occurred will be an extremely fact-specific inquiry. It is likely that a regulatory definition will fail to encompass the particular constellation of facts that will determine compliance from non-compliance. Such new MMS procedures must also preserve the confidentiality of the contracts and other commercially sensitive documents that are likely to be at issue in any particular complaint proceeding.

4. **There Is No Need For An Additional Complaint Forum.** The MMS should consider whether there is any actual necessity for the MMS to make itself available as an additional agency to receive OCSLA-based complaints. The statute contemplates that aggrieved parties have a forum to bring complaints under the OCSLA before a federal district court. Given

the rarity of OCS discrimination cases, and the express jurisdiction over OCSLA complaints granted federal district courts, the MMS may wish to forego erecting an official MMS complaint procedure entirely.

II.
BACKGROUND INFORMATION

DEFS was formed March 31, 2000, by combining the North American midstream natural gas gathering, processing, marketing and natural gas liquids businesses of Duke Energy Corp. and Phillips Petroleum Company. The natural gas segment of DEFS' business involves natural gas gathering, processing, transportation and storage, from which DEFS generates revenues primarily by providing services such as compression, treating and gathering, processing, transportation of residue gas, storage and marketing.

With regard to its offshore activities, DEFS gathers raw natural gas through gathering systems located in Offshore Gulf of Mexico. Through its subsidiaries PanEnergy Dauphin Island, LLC, and Centana Gathering, LLC, DEFS owns an approximate 72 percent interest in Dauphin Island Gathering Partners ("DIGP"), which in turn owns offshore natural gas gathering and transmission facilities. Other partners in DIGP include subsidiaries of El Paso Field Services, L.P., and a subsidiary of Dominion Corporation. DIGP's affiliate, Duke Energy Operating Company, operates the DIGP system. DIGP operates offshore in the Gulf of Mexico and has been deemed by the Commission to be a system that is comprised in part of non-jurisdictional gathering lines and in part of jurisdictional transmission facilities. DEFS also owns additional point-to-point gathering interests in the Gulf of Mexico, and a 33.33% interest in Discovery Producer Services LLC, which also owns offshore natural gas gathering and transmission facilities.

The MMS states in its Notice that the agency is particularly interested in the comments of pipeline companies that have been granted rights-of-way regulated by the MMS under the OCSLA. As described above, DEFS' subsidiary DIGP has been granted such a right-of-way, and thus its comments are worthy of particular attention by the MMS. DEFS also actively participated in FERC's Order No. 639 OCSLA rulemaking proceedings, and was a Petitioner in the appeals of those regulations. DEFS has undertaken extensive research regarding the history of these portions of the OCSLA, and can shed considerable light on the types of agency rules that will advance the intent of Congress when it adopted those provisions of the OCSLA. DEFS consequently is able to bring a valuable perspective to this MMS proceeding.

III.
COMMENTS

A. Any OCS Regulation Should Be Extremely Light-Handed.

1. Statutory Language Demonstrates Light-Handed Approach is Required.

Congress created an obligation on the part of OCS pipelines to act without discrimination in the transportation and purchase of oil or gas pursuant to OCSLA Section 5(e). This statute provides:

> Rights-of-way [over the OCS] ... may be granted ... upon the express condition that oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced ... in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste. 43 U.S.C. § 1334(e).

In 1978, Congress amended the OCSLA and added § 5(f), which provides that:

> Every permit, license, easement, right-of-way, or other grant of authority for transportation by pipeline on or across the outer Continental Shelf of oil or gas shall require that the pipeline be

operated in accordance with the following competitive principles:
(A) The pipeline must provide open and nondiscriminatory access to both owner and non-owner shippers. 43 U.S.C. § 1334(f).

The statute very straightforwardly provides for rights-of-way and other grants of authority by the MMS to be subject to obligations of open-access and non-discrimination. The provisions in the OCSLA that prohibit "discrimination" are thus limited in their scope. They do not specifically authorize any federal agency to issue heavy-handed enforcement regulations of the type issued by FERC in Order No. 639. The statement that "oil or natural gas pipelines shall transport or purchase without discrimination" which occurs in Section 1334(e) describes only what the Secretary of Interior (or where appropriate the Secretary of Transportation) is to include in permits. The language in Section 1334(f)(1)(A), says only that "every permit, license, easement, right of way or other grant of authority" must "provide [for] open and nondiscriminatory access."

In passing the 1978 amendments to the OCSLA, which contained the non-discrimination language upon which the rule is purportedly based, Congress stressed that it was not creating a new, burdensome regulatory regime. In passing the 1978 OCSLA amendments, Congress emphasized that it was specifically concerned with integrated oil producers that were using a loophole in the existing regulations to build oil lines to transport their own production in a manner that would create "bottleneck monopolies." The 1978 OCSLA amendments were intended to close a narrow loophole. Sections 5(e) and 5(f) of the OCSLA consequently should not be viewed by the MMS as an invitation to create broad or intrusive enforcement regulations.

During the debate on the amendment that later became subsection 1334(f), Senator Kennedy, who first offered the amendment, stated that the Secretary of the Interior would place the open access conditions in the leasing arrangements and then the ICC [now FERC] would enforce them. 123 Cong. Rec. at S23253 ("what I would see happening is that this would be

boilerplate language in the leasing arrangements and that ... the enforcement of that could be done by the ICC. Basically, all that we are trying to insure is that in the right-of-way grants, these provisions be included.") These remarks, and the text of the OCSLA itself, indicate that Congress was merely ensuring that open-access and non-discrimination obligations were uniformly included in every lease, right-of-way or other grant of authority on the OCS. As discussed below, these provisions of the OCSLA were to be self-policing through complaints, in a manner that would not create extensive compliance obligations.

2. Statutory History Shows That Congress Intended A Light-Handed Approach.

In enacting §§ 5(e) and 5(f) of the OCSLA, Congress intended that competition, not pervasive regulation, prevail in the OCS. It is important that the MMS act in a manner consistent with this intent. There is a great deal of evidence in the statutory history of this portion of the OCSLA that it was passed to create a light-handed and even-handed treatment of OCS shippers *without* increasing their regulatory burdens. For example, arguing in support of the conference report and the bill adopting the OCSLA, Senator Hansen of Wyoming said that he had:

> strong disagreement with the regulatory climate that has been developing regarding the production of oil and gas on the Outer Continental Shelf. . . . [T]he regulatory procedures which currently govern OCS operations are excessive. They slow down and inhibit efforts to develop oil and gas to meet our energy needs and ultimately cost the consumer far more than the benefits realized from those regulations.[2]

Senator Hansen urged that, in conjunction with passage of the bill, "the President and Secretary would draw the line on further regulations. I would hope that they would take the current system and say that this is as far as we will go."[3] He added that "[t]he fastest way to

[2] 124 Cong. Rec. 27,262-63 (1978) (Statement of Senator Hansen) (Appendix A, pp. 8-9).

[3] *Id.* at 27,263 (Appendix A, p. 9).

develop new oil and gas resources is to remove regulatory and market paraphernalia which stymie the abilities of the private sector to provide for the energy needs of Americans."[4]

3. Congress Intended That the OCSLA Obligations Not Be the Subject of Extensive Rules.

When it enacted the OCSLA, it is clear that Congress intended that parties aggrieved by violations of the OCSLA would bring a citizens suit in a court of law. Section 1349(a) establishes procedures for such a suit, and provides that, except for reviews of the Secretary of Interior's approval of leasing programs, or the Secretary's action to approve, modify or disapprove any exploration, development or production plan, "all suits challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this Act, or any regulation promulgated under this Act . . . shall be undertaken in accordance with the procedures described in this subsection [*i.e.*, as a citizen's suit]."[5] Under Section 1349(b), Congress granted original jurisdiction to the district courts of the United States for such suits, for cases and controversies arising out of any operation conducted on the OCS which involve exploration, development or production of the minerals, of the subsoil and seabed of the OCS.[6]

The D.C. Circuit has specifically recognized that charges of discrimination under the OCSLA properly belong in district court.[7] Congress contemplated that parties aggrieved by violations of the OCSLA would bring a citizens suit in a court of law. Section 1349(a) of the OCSLA establishes procedures for such a suit, and provides that, except for reviews of the

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[4] *Id.*

[5] Under 43 U.S.C. § 1349, citizens become "private attorney general[s] with respect to enforcement of Outer Continental Shelf Lands Act, bring suit to enforce [the] act and regulations promulgated pursuant to it, and seek civil penalties." *Wentz v. Kerr-McGee Corp.*, 784 F.2d 699 (5th Cir. 1986).

[6] The OCSLA defines the term "production" to include transfer of minerals to shore, (§ 1331(m)) and the term "minerals" is defined to include both "oil" and "gas." (§ 1331(q)).

[7] Shell/Bonito, 47 F.3d at 1192.

Secretary of Interior's approval of leasing programs, or the Secretary's action to approve, modify or disapprove any exploration, development or production plan, "all suits challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this Act, or any regulation promulgated under this Act . . . shall be undertaken in accordance with the procedures described in this subsection [*i.e.*, as a citizen's suit]."[8] Under Section 1349(b), Congress granted original jurisdiction to the district courts of the United States for such suits, for cases and controversies arising out of any operation conducted on the OCS which involve exploration, development or production of the minerals, of the subsoil and seabed of the OCS.[9]

Section 1350, which provides for OCSLA remedies and procedures, states that the "Secretary [of Interior], Secretary of the Army, or the Secretary of the Department in which the Coast Guard is operating, the Attorney General or a United States attorney" that may institute a civil action—in the appropriate U.S. district court—to obtain the appropriate remedy to enforce "any provision of this Act, any regulation or order issued under this Act, or any term of a lease, license, or permit issued pursuant to this Act."[10] Civil penalties, if any, may be assessed by the Secretary of Interior after hearing.[11] Failure to comply specifically with Section 5(e) (compliance with conditions under which rights-of-way are granted including transportation or purchase without discrimination) is ground for forfeiture of the right-of-way grant "in an

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[10] 43 U.S.C. § 1350(a).

[11] 43 U.S.C. § 1350(b).

appropriate judicial proceeding instituted by the United States in any United States district court having jurisdiction under the provisions of this Act."[12]

4. **Light-Handed Regulation Has Worked.**

The legislative history of the OCSLA thus demonstrates that Congress' overall objective was for rates and services in the OCS to be controlled by competition. There is currently a great deal of competition and investment in the OCS, indicating that this very light-handed approach to OCS regulation has been successful. It would be contrary to that objective to impose heavy-handed regulatory provisions to enforce the OCSLA non-discrimination and open-access requirements. It would be especially imprudent to impose an Order No. 639-style reporting requirement when there is no evidentiary basis justifying the need for such market information, and indeed where the evidence clearly demonstrates that disclosure of confidential contractual information will have anti-competitive effects.

There have been only two official allegations of discrimination or failure to grant open access on the OCS. Both cases, *Bonito* and *Murphy,* involved fact-specific scenarios in which the pipeline that was alleged to be discriminating appeared to have a good faith claim for denying service (in the case of *Bonito*) and for charging a different rate for a service (in the case of *Murphy*). Given the level and intensity of transactions occurring in the OCS, this is an admirable record. It is not the sort of record that indicates pipeline market abuse or that calls for agency intrusion.

[12] 43 U.S.C. § 1334(e).

B. Regulations Should Treat All OCS Pipelines in a Uniform Manner.

1. MMS Regulations Should Not Treat OCS Pipelines Differently.

Should the MMS adopt new regulations to enforce the OCSLA, all OCS pipelines should be subject to the same regulatory requirements. A major problem under the FERC's heavy-handed OCSLA enforcement regulations was the application of stringent reporting regulations on some pipelines, while many other pipelines were exempt from any reporting obligation at all. Regulatory requirements that single out one type of OCS player for enforcement, but that ignore other players, would create an unlevel OCS playing field, stifle competition, lessen OCS service offerings, and could ultimately drive certain parties out of the OCS transportation market. Because they are subject to dual statutory obligations on the OCS, NGA-jurisdictional pipelines operating on the OCS are the most likely to be harmed by overlapping statutes, overlapping agency authority and potentially conflicting precedent.[13]

Despite the active development of infrastructure on the OCS and the numerous amounts of transportation contracts transacted there, there have been only two complaints brought to FERC to resolve complaints about alleged discriminatory treatment or denial of service on the OCS.[14] DEFS, and others presented evidence in FERC's Order No 639 proceedings showing that there is little to no incentive on the OCS to discriminate against or to deny service to any prospective shipper. In addition to these actions being contrary to the OCSLA, for non-FERC jurisdictional OCS entities, and contrary to both the OCSLA and the NGA, for FERC-jurisdictional OCS entities, entrepreneurs seeking to perform paid transportation services would

[13] With regard to oil pipelines, the law is clear that the Interstate Commerce Act ("ICA") does not apply to OCS oil pipelines that lie entirely on the OCS, and the FERC therefore lacks jurisdiction to enforce the ICA against such pipelines. *Shell*, 47 F.3d 1186, 1199. Natural gas gathering lines operating on the OCS are also beyond the reach of the FERC's NGA authority. Thus, interstate natural gas pipelines would be the only transporters on the OCS to be subject to two sets of potentially conflicting statutes. The MMS should be wary of contributing to the uncertainty of potentially conflicting precedents and statutory interpretation between agencies.

[14] These cases, *Shell/Bonito* and *Murphy Oil*, are discussed in more detail infra.

tend to not turn away business unless there was a good—and non-discriminatory-- reason to do so.

C. Enforcement Should Rely on Complaints, Not Extensive Regulation.

1. OCSLA Contemplates Enforcement Through Complaint.

In its Notice, the MMS indicates that it is considering basing any new regulations to enforce §§ 5(e) and 5(f) of the OCSLA upon complaints alleging discrimination or improper denial of service. If the MMS is to create new OCSLA-based regulations at all, this is the correct approach. As discussed above, Congress intended the OCSLA obligations of open-access and non-discrimination to be self-policing. It is clear from the face of the OCSLA and from its statutory history that Congress intended that parties aggrieved by violations of the OCSLA would bring a citizens suit in a court of law.

The goal of light-handed regulation and increased competition in the OCS would be thwarted if the complaint process did not observe the confidentiality of the relevant transportation contracts. Disclosure of commercially sensitive contractual information would allow competitors to obtain proprietary information about how gatherers and shippers are structuring their business relationships. Competitors, armed with knowledge of their rivals' business plans, would be able to use that information to cherry-pick and undercut that pipeline's efforts to compete for business.

It is particularly important that any regulatory regime not compel the wholesale disclosure of contracts by OCS pipelines. Congress has recognized in another statute—the Interstate Commerce Act—that release of detailed contract information regarding pipeline transportation agreements can be harmful to competition. Section 15(13)[15] of the ICA prohibits

[15] 49 U.S.C. app. § 15 (13).

the disclosure by a common carrier, the common carrier's agents, employees or officers, or for any other person or corporation lawfully authorized by the common carrier to receive such information knowingly to disclose:

> any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transport *which may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor....*[16]

The ICA *prohibits and punishes* the release of contract information on oil pipelines. The MMS should be very certain, if it contemplates the creation of new complaint procedures, that the complaint process will allow the parties to maintain the confidentiality of all documents relevant to the particular complaint.

The MMS should also bear in mind that long-term contracts are common in the OCS. Thus, it is likely that any public disclosure of contract provisions will be terms that govern the pipeline's provision of service for years into the future. These terms are commercially sensitive and should remain private information, in the same way that trade secrets and other corporate proprietary information have traditionally been protected from disclosure. The Commission, for example, has long recognized the need for protective orders to guard against the improper disclosure of commercially sensitive information.[17]

Thus, if the MMS decides to become a forum for OCSLA-based complaints, it should guard against the public disclosure of contracts and other commercially sensitive documents.

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[16] Id. (emphasis supplied).

[17] With regard to FERC's complaint procedures ("Complaint Procedures," Order No. 602-A, Docket No. RM98-13, 64 Fed. Reg. 43600 (July 28, 1999)), which apply specifically to OCSLA complaints, FERC took pains to accommodate special treatment of commercially sensitive information. FERC ruled, among other things, that "it did not intend for [commercially sensitive] information to be available to non-parties." Order No. 602-A, slip op. at 7.

2. **It is Inappropriate to Define What Will Constitute "Discrimination" or "Equal Access" Under the OCSLA.**

It is not advisable for the MMS to adopt an official definition of "equal access" or "discrimination." These are very fact-intensive concepts that will vary widely from one case to another. The FERC applies these conceptual standards extensively under its NGA authority, but has no "official" definition of these terms. Rather, the standards have evolved through the development of precedent over the years. If the MMS is to become a forum for complaints involving alleged instances of discrimination or denial of service, it should forego trying to define these concepts and opt instead to develop clear precedents or attempt to apply those precedents that have already been applied by FERC.

There currently is no fixed legal or regulatory standard governing what constitutes "discrimination" or "equal access" under the OCSLA. There are only two cases in which the FERC was charged with determining whether such alleged violations of the OCSLA had taken place. These cases were both extremely fact-specific. One of the two cases was even resolved with the equivalent of a negotiated settlement, thus it was never determined whether a "discriminatory" practice had even taken place, and if so what exactly constituted the discriminatory practice.[18] Thus, an attempt by the MMS to define "discrimination" or "open-

[18]With regard specifically to "discrimination" under the OCSLA, the only FERC precedent is Murphy Exploration & Production Co., 81 F.E.R.C. 61,148 (1997). After a producer had complained to FERC that Quivira Pipeline Company was charging different rates for similar service, FERC issued a show cause order asking why certain of Quivira's transportation charges should not be found discriminatory. Although Quivira had defended itself with extensive filings justifying the discrepancy in its charges, Quivira ultimately sought compromise. Over a year after the show cause order was issued, Quivira filed a statement with the Commission neither admitting nor denying discrimination, announcing that Quivira would reduce its gathering rates to a single rate for all shippers regardless of volume tendered and would offer refunds to shippers that had paid more than that single rate over the previous year. The actual merits of the discrimination claim were never actually litigated.

In Bonito Pipe Line Co., 61 FERC 61,050 (1992); aff'd Shell Oil Co. v. FERC, 47 F.3d 1186 (D.C. Cir. 1995) ("Bonito") the Commission required Bonito Pipe Line Company, an OCS pipeline, to accept sour crude shipments from Shell because the Bonito system already transported sour crude and had historically been a sour crude system. While this was a fully litigated case, the precedent may be of limited value since it addresses only the denial of service on quality ground, and under the specific factual scenario dealt with by FERC and the Court. What precedential value there is in Bonito is not readily susceptible to a definitional formula. Roughly, the Bonito case

access" should be avoided since any formulation will be insufficient to describe the particular attributes of proscribed actions. Definitions will inevitably be faulty and will lead to confusion and regulatory risk.

There may be a number of perfectly legitimate reasons for a pipeline to reject a shipper's request for service. For example, many pipelines operating on the OCS are NGA-jurisdictional. An NGA-jurisdictional pipeline's tariff generally prohibits the pipeline from entering into new agreements to provide firm service beyond the pipeline's ability to provide firm service to its existing customers. NGA-jurisdictional pipelines are not common carriers, and their obligations to provide service are set pursuant to contract.[19] Thus, an NGA-jurisdictional pipeline that is already full may categorically deny service to prospective shippers, and such denial is perfectly consistent with the NGA.

There are also a host of tariff-based considerations that could legitimately excuse the NGA-jurisdictional pipeline from providing service. Analogous contract provisions imposed by non-jurisdictional OCS pipelines, if applied on a reasonable and non-discriminatory basis, could also provide the pipeline with a legitimate reason for denying service. These considerations include rejection of prospective shippers on grounds of the prospective shipper's lack of creditworthiness, the quality of the product to be transported in the pipeline, the pipeline's need to construct interconnection facilities on an non-reimbursed basis, the prospective shipper's unwillingness to enter into a contract unless a price discount is granted by the pipeline, and the

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instructs that FERC can require a pipeline to provide transportation upon a request that is reasonable under the particular circumstances, but the Commission will not require a pipeline to accept for transportation new volumes of crude oil that would change the historic operating conditions on the pipeline and cause financial detriment to other shippers. Further, the Commission will not require a pipeline to bear the entire costs of facilities necessary to provide service that changes the historic operating conditions on the pipeline.

[19] Common carriers, in contrast, are required to partially curtail service to existing customers in order to provide a proportional share of service requested by the new customer.

like. Once service has commenced, the pipeline may have a legitimate reason for discontinuing service for failure to pay bills or for otherwise triggering a contractual default provision.

For these reasons it would be difficult to adopt a one-size-fits-all definition of "discrimination." A definition which works for an oil facility might not fit the facts of a natural gas pipeline regulated under the NGA. It would be most appropriate to not adopt extensive regulations and continue to allow competition to be the primary guiding force on the OCS.

D. MMS Complaint Proceedings May Be Unnecessary.

The complaint-based OCSLA enforcement currently in place has brought about an extremely competitive market, which encourages the creation of pipeline infrastructure and the entry of new service providers into the market. As contemplated by the drafters of Sections 5(e) and 5(f) of the OCSLA, effective statutory and competitive deterrents to discriminatory practices already exist on the OCS. The OCS has grown to become the nation's largest domestic supply of oil and natural gas. During the 1950s, the OCS constituted less than one percent of total U.S. oil and natural gas production. Since that time, OCS production has grown to more than 25 percent of domestic natural gas production and about 25 percent of oil production. Ninety percent of this production comes from the Central and Western Gulf of Mexico, making the Gulf of Mexico the largest single domestic source of oil for the U.S. market.

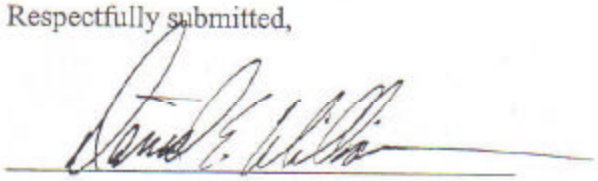
There is little to no incentive on the OCS to discriminate against or to deny service to any prospective shipper. In light of the intense level of competition that currently defines the OCS, the MMS should consider whether there is any actual necessity for the MMS to make itself available as an additional agency to receive OCSLA-based complaints. Only one case of alleged OCS discrimination has ever surfaced. Likewise, only a single case alleging the unreasonable denial of service on the OCS has ever surfaced. In both of these cases, *Murphy* and *Bonito*, the pipelines against which the complaints were filed had good-faith justifications for their actions.

The MMS may wish to forego erecting an official MMS complaint procedure entirely. District courts remain available as forums for OCSLA complaints, as contemplated in the OCSLA. There is no evidence that an additional forum is needed. Thus, it would be reasonable for the MMS to conclude, based upon the above factors, that a new OCSLA complaint forum was unnecessary.

IV.
CONCLUSION

For the reasons stated above, DEFS urges the MMS to maintain the light-handed regulatory regime that currently exists on the OCS. By enabling competition to continue to drive the transactions on the OCS, the MMS will encourage competition and act in a manner consistent with the intentions of Congress when it enacted sections 5(e) and 5(f) of the OCSLA. If any new regulations are adopted, they should be complaint driven, and should not attempt to impose regulatory definitions of what constitutes "discrimination" or "open-access" on the OCS.

Respectfully submitted,



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